84-2014

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ALEXANDER L. STEVAS,
CLERK

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JAVIER FLORES,
Petitioner,

v.

SOUTHERN PACIFIC TRANSPORTATION CO., Et Al,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

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Of Counsel:

CHARLES M. HADEN

Alpha Law Brief Co., Inc.—5606 Parkersburg—Houston, Texas 77036—223-3003

QUESTION PRESENTED

Whether the Summary Judgment granted by the Trial Court in favor of Respondent, Estate of H. H. Coffield, Deceased, and Estate of Charles H. Coffield, Deceased, doing business as Coffield Warehouse Company, is correct in holding as a matter of law that Respondent is not a "common carrier by rail" for purposes of establishing liability of the Respondent under 45 U.S.C. § 51-60, the Federal Employers Liability Act, for personal injuries sustained by Javier Flores, deceased, while in the course and scope of his employment.

LIST OF PARTIES

Petitioner, Maria Sierra Flores, as personal representative of the estate of Javier Flores, deceased.

Estate of H. H. Coffield, Deceased, and Estate of Charles H. Coffield, Deceased, doing business as Coffield Warehouse Company, hereinafter referred to as Coffield, is the only Respondent in this case. Southern Pacific Transportation Co. was a defendant in the court below, but is not a Respondent in this case.

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SOUTHERN PACIFIC TRANSPORTATION CO., Et Al,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

Petitioner, Maria Sierra Flores, as personal representative of the estate of Javier Flores, deceased, petitions for a writ of certiorari to review the judgment of the Supreme Court of the State of Texas in this case.

OPINIONS BELOW

No opinion was issued by the Supreme Court of the State of Texas. Petitioner's Application for Writ of Error was refused with the notation, No Reversible Error.

The opinion of the Court of Appeals for the Sixth Supreme Judicial District of Texas (Appendix B, infra, pp. 3a-9a) is reported at 683 S.W.2d 31.

JURISDICTION

The judgment of the Court of Appeals (Appendix C, infra, pp. 10a-12a) was entered on October 23, 1984. A Motion for Rehearing was overruled on November 20, 1984. An Application for Writ of Error to the Supreme Court of the State of Texas was refused on February 6, 1985 with the notation "No Reversible Error." (Appendix A, infra, p. 1a) A Motion for Rehearing of the Application for Writ of Error was overruled on March 13, 1985. (Appendix A, infra, p. 2a) The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

STATUTORY PROVISION INVOLVED

The Federal Employer's Liability Act, 45 U.S.C. § 51, provides in relevant part:

> Every common carrier by railroad while engaging in commerce between any of the several States or Territories . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow . . . and children of such employee . . . for such injury . . . resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier. . . .
>
> Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

STATEMENT

This is a personal injury suit involving application of the Federal Employers' Liability Act, 45 U.S.C. § 51. Petitioner, Maria Sierra Flores, is the widow of Javier Flores. Maria Sierra Flores is the Petitioner in this case due to the untimely death of Javier Flores, which death is unrelated to this cause. Mr. Flores, who was Plaintiff in the trial court, suffered the traumatic amputation of both legs at or below the knee on or about February 17, 1981, while in the course and scope of his employment with Respondent, Coffield Warehouse Company. He was run over by a cut of railroad cars. The railroad track which is located entirely within the company premises of Coffield and the locomotive switch engine that was backed into the cut of railroad cars were both owned, operated and maintained by Respondent, Coffield Warehouse Company.

Mr. Flores, filed a lawsuit against Respondent, Coffield, and the Southern Pacific Transportation Company, for injuries under the Federal Employers' Liability Act. Both Coffield and Southern Pacific filed motions for summary judgments in the trial court. Southern Pacific is no longer an interested party in this proceeding.

Respondent, Coffield's Motion for Summary Judgment alleged it was not a "common carrier by railroad" and therefore not liable to the Petitioner under the FELA. Javier Flores filed his own Motion for Summary Judgment alleging that Coffield was a common carrier by railroad. The trial court granted Respondent's Motion for Summary Judgment and held that Respondent was not a common carrier by rail.

As can be seen, the federal question sought to be reviewed in this court was first raised at the trial court level. Petitioner, Flores, appealed the summary judgment to the Court of Appeals for the Sixth Supreme Judicial District of Texas. That opinion affirmed the trial court's action and found that Coffield was no a common carrier by railroad. (Appendix B, infra, pp. 3a-9a). The Supreme Court of the State of Texas thereafter refused Plaintiff's timely Application for Writ of Error with the notation, No Reversible Error, and subsequently overruled Petitioner's Motion for Rehearing. The federal question concerning Respondent's status as a common carrier under the FELA was therefore, raised and passed upon initially at the trial court and thereafter at each subsequent proceeding through the appellate courts.

REASONS FOR GRANTING THE WRIT

The decisions below encroach upon the rights of employees under the Federal Employers' Liability Act, 45 U.S.C. § 51. They are in conflict with applicable decisions of this Court and decisions of the United States Court of Appeals for the Fifth Circuit construing that statute.

The trial court, in granting Respondent's Motion for Summary Judgment on the issue of application of the Federal Employers' Liability Act, concluded that Respondent, Coffield, a warehousing and grain storage facility, which loads and unloads railroad cars and owns its own railroad tracks and locomotive engines and employs its own crew to operate them, can defeat Petitioner's just claim for recompense for injuries suffered as a result of Coffield's negligence by asserting the lack of common carrier by railroad status required under the Federal Employers' Liability Act.

The FELA was established to provide railroad employees with adequate protection under the federal law for personal injuries and/or death resulting from the negligence of railroads. In 1920, this Court set out to define the words "common carrier by railroad" in *Wells Fargo & Co. v. Taylor*, 254 U.S. 175 (1920). The United States Court of Appeals for the Fifth Circuit thereafter set out four considerations of prime importance to be used in determining whether an entity is a common carrier by railroad. *Lone Star Steel Co. v. McGee*, 380 F.2d 640 (5th Cir.), *cert. denied*, 389 U.S. 977 (1967).

Since then, numerous decisions from this Court, the Circuit Courts and other courts have been handed down regarding common carrier status of different types of commercial entities with each one turning on each individual fact situation. See e.g., *Edwards v. Pacific Fruit Express Co.*, 390 U.S. 538 (1968); *Kelly v. General Electric Co.*, 110 F. Supp. 4 (E.D. Pa. 1953), *aff'd per curiam*, 204 F.2d 692; *McCrea v. Harris County Ship Channel Navigation District*, 423 F.2d 605 (5th Cir. 1970), *cert. denied* 400 U.S. 927; *Thurmond v. Armco Steel Corp.*, Civil Action No. H-79-1840 (S.D. Tex. Oct. 17, 1980). Because of this, a great injustice has been perpetrated against seriously injured employees of commercial entities like Coffield Warehouse Co. These entities are, in effect, operating "mini-railroads", within their own plant facilities, thus exposing their employees to all of the attendant dangers and risks inherent in the railroad industry as a whole. The employees of these mini-railroads are deprived of the protection of the FELA simply because these entities are able to circumvent application of the law by making sure they do not operate as common carriers by rail.

Petitioner believes the Respondent in this case meets the four part test of *Lone Star Steel v. McGee* and therefore is a common carrier by railroad which entitles him to the benefits of the FELA.

Federal rules of law control actions under the Federal Employers' Liability Act. *Chesapeake & Ohio Railroad Co. v. Kuhn*, 284 U.S. 44, 47 (1931). What constitutes a common carrier is, therefore, to be determined by looking to the Federal decisions. The state courts must apply federal rules in their decision-making process and it is apparent from a reading of the Texas Court of Appeals Opinion (Appendix B, infra, pp. 3a-9a) that they have misapplied these Federal rules of law and have reached an erroneous and unjust decision in this case. The undisputed facts in this case clearly show that Coffield is a common carrier and should be liable to Petitioner for the injuries he suffered. The Supreme Court of the State of Texas was given the opportunity to review and correct this decision but felt that the errors committed by the Court of Appeals did not require reversal. It is apparent that these state courts have misread and therefore misapplied the federal rules governing the issue in question. This Court should take this opportunity to correct these errors and to clarify the federal law so that state courts in the future will not make the same mistakes.

Of far more reaching importance, however, is the fact that commercial entities like the Respondent in this case are allowed to hire employees who must work under extremely dangerous conditions without the protection afforded by the FELA to railroad employees who do much the same type of work. Indeed, because of this, employees of this type are forced to resort to the woefully inadequate state workers' compensation law for the com-

pensation of their injuries which can be terribly devastating as in this case where both of the Petitioner's legs were traumatically amputated.

The time has come for this Court to decide once and for all that the application of the FELA should be extended to these mini-railroads, and to set out guidelines for the federal and state courts to follow in the determination of issues such as the one contained herein. Any commercial entity which chooses to operate an intraplant rail facility using its own equipment and its own employees for such work should be subjected to the Federal Employers' Liability Act. The employees of these entities should have the same protections afforded employees of railroad companies regardless of the status of these entities as common carriers. Of equal importance, however, is the fact that erroneous decisions like the one made the basis of this writ can and should be prevented in the future by definite guidelines enunciated by this Court for the benefit of the state courts.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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(713) 227-3111

Attorneys for Petitioner

Of Counsel:

CHARLES M. HADEN

APPENDIX A

Orders of the Supreme Court of the State of Texas

SUPREME COURT OF TEXAS
P. O. Box 12248
Supreme Court Building
Austin, Texas 78711
Mary M. Wakefield, Clerk pro tempore

February 6, 1985

Mr. Charles M. Haden
Brown & Haden
609 Fannin, Suite 200
Houston, TX 77002

Mr. J. L. Hinojosa
Brown & Haden
609 Fannin, Suite 200
Houston, TX 77002

Mr. Arno W. Krebs, Jr.
Fulbright & Jaworski
800 Bank of the Southwest Building
Houston, TX 77002

RE: Case No. C-3783

STYLE: JAVIER FLORES
v. SOUTHERN PACIFIC TRANSPORTATION CO., ET AL

Dear Counsel:

Today, the Supreme Court of Texas refused the above referenced application for writ of error with the notation, No Reversible Error.

Respectfully yours,

Mary M. Wakefield,
Clerk pro tempore

By: /s/ Courtland Crocker
Deputy

SUPREME COURT OF TEXAS
P. O. Box 12248
Supreme Court Building
Austin, Texas 78711
Mary M. Wakefield, Clerk

March 13, 1985

Mr. Charles M. Haden
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Mr. Arno W. Krebs, Jr.
Fulbright & Jaworski
800 Bank of the Southwest Building
Houston, TX 77002

RE: Case No. C-3783

STYLE: JAVIER FLORES
v. SOUTHERN PACIFIC TRANSPORTATION CO., ET AL

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above styled case.

Respectfully yours,

Mary M. Wakefield,
Clerk

By: /s/ Courtland Crocker
Deputy

APPENDIX B

Opinion of the Court of Appeals of the Sixth Supreme Judicial District of Texas

Javier FLORES, Appellant,

v.

COFFIELD WAREHOUSE COMPANY, Appellee.

No. 9251

Court of Appeals of Texas,
Texarkana.

Oct. 23, 1984.

Rehearing Denied Nov. 20, 1984

Employee brought action against employer warehouse company for damages resulting from the amputation of his legs when a railroad car on the employer's premises rolled over them. The 157th District Court, Harris County, Felix Salazar, Jr., J., entered summary judgment in favor of employer, and employee appealed. The Court of Appeals, Bleil, J., held that the employer warehouse company which operated its rail facilities only in connection with its warehouse storage business, did not transport goods for public services, did not hold itself out to the public as performing as a part of an interstate rail transportation and whose remuneration was based upon its charges to customers for unloading, storage and loading was not a common carrier by railroad and thus was not liable to employee under the Federal Employers' Liability Act.

Affirmed.

1. Appeal and Error: 863,934 (1)

When Court of Appeals reviews summary judgments it applies the following rules: the movants must show that there is no issue of material fact and that they are entitled to judgment as a matter of law, evidence favorable to the nonmovant is taken as true, and every reasonable inference in favor of the nonmovant or the one against whom summary judgment is granted is indulged.

2. Employers' Liability: 3

Four factors to determine whether an entity is a common carrier for purposes of the Federal Employers' Liability Act are: the entity actually performs rail service, it performs a service which is part of the total rail service contracted for by a member of the public, it performs as a part of the system of interstate rail transportation by virtue of common ownership between itself and a railroad or by a contractual relationship with the railroad and thus is deemed to be holding itself out to the public as a railroad, and it receives remuneration for the services performed in some manner such as a fixed charge from a railroad or by a percentage of the profits from a railroad. Federal Employers' Liability Act, §§ 1-10, 45 U.S.C.A. §§ 51-60.

3. Employers' Liability: 3

Warehouse company which operated its rail facilities only in connection with its warehouse and storage business, did not transport goods for public purposes, did not hold itself out to the public as performing as a part of an interstate rail transportation and whose remuneration was based upon its charges to customers for un-

loading, storage and loading was not a common carrier by railroad and thus was not liable under the Federal Employers' Liability Act to its employee whose legs were amputated when a railroad car on the company's premises rolled over his legs. Federal Employers' Liability Act, §§ 1-10, 45 U.S.C.A. §§ 51-60.

4. States: 4.10

Damages for the death or injury of an employee of a railroad engaged in interstate commerce, allegedly caused by the negligence of the railroad, are recoverable exclusively from the railroad under the Federal Employers' Liability Act and not under state law. Federal Employers' Liability Act, §§ 1-10, 45 U.S.C.A. §§ 51-60.

J. L. Hinojosa, Brown & Haden, Houston, for appellant.

Arno W. Krebs, Jr., Fulbright & Jaworski, W. T. Womble, John C. Millberg, Crain, Caton, James & Womble, Houston, for appellee.

BLEIL, Justice.

Javier Flores appeals from a summary judgment granted in favor of Coffield Warehouse Company. Each side concedes that there is no disputed material fact issue. The issue before us is whether the facts establish that Coffield is not a "common carrier by railroad," as used in the Federal Employers' Liability Act, 45 U.S.C.A. §§ 51-60 (1972). We conclude that Coffield was not a common carrier by railroad and therefore uphold the summary judgment in favor of Coffield.

While working for Coffield Warehouse Company, Flores was directed to repair a grain hopper conveyer belt located on the company's premises. In order to get to the conveyer belt, Flores crossed over a set of railroad tracks in between two stationary railcars parked on the tracks. He climbed onto and over the coupling between the cars when a locomotive switch engine was backed into the railcars. The sudden impact threw Flores down onto the track and beneath one of the car's wheels. As the railcar was pushed along the track the wheels rolled over Flores amputating his legs. The railroad track and locomotive switch engine were owned, operated, and maintained by Coffield.

Flores sued Coffield and Southern Pacific Transportation Company. Southern Pacific filed a motion for summary judgment alleging that Flores was not its borrowed servant and that it in no manner was resposible for the injuries suffered by Flores; Southern Pacific prevailed on its motion. Flores did not appeal the summary judgment granted to Southern Pacific. Coffield also moved for summary judgment alleging that Flores had waived his claim for action under common law or any other statute

because he was covered by the Texas Workers' Compensation Act, Tex. Rev. Civ. Stat. Ann. art. 8306 (Vernon 1967). It claimed that Flores' recovery was limited to workers' compensation benefits. Coffield further alleged that it was not a common carrier by railroad and therefore not liable to Flores under the Federal Employers' Liability Act or any other act.

[1] Generally when we review summary judgments we apply the following rules: (1) the movants must show that there is no issue of material fact and that they are entitled to judgment as a matter of law; (2) we take as true all evidence favorable to the nonmovant; and (3) we indulge every reasonable inference in favor of the nonmovant or the one against whom summary judgment is granted. *Wilcox v. St. Mary's Univ. of San Antonio,* 531 S.W.2d 589 (Tex. 1975); Tex. R. Civ. P. 166-A. However, because each side agrees that there is no issue of material fact we find this appeal can be resolved by determining a single question of law: whether the undisputed facts establish that Coffield was not a common carrier.

[2] A common carrier by railroad under FELA has been held to mean one who operates a railroad as a means of carrying for the public. *Wells Fargo & Co. v. Taylor,* 254 U.S. 175, 41 S.Ct. 93, 65 L.Ed. 205 (1920). In reviewing the pertinent provisions of the Federal Employers' Liability Act, the United States Court of Appeals for the Fifth Circuit has set forth four significant considerations in determining whether an entity is a common carrier. These factors are whether the entity: (1) actually performs rail service; (2) performs a service which is part of the total rail service contracted for by a member

of the public; (3) performs as a part of the system of interstate rail transportation by virtue of common ownership between itself and a railroad or by a contractual relationship with a railroad, and hence is deemed to be holding itself out to the public as a railroad; and (4) receives remuneration for the services performed in some manner such as a fixed charge from a railroad or by percentage of the profits from a railroad. *Mahfood v. Continental Grain Co.*, 718 F.2d 779 (5th Cir. 1983); *Lone Star Steel Co. v. McGee*, 380 F.2d 640 (5th Cir. 1967). Therefore, the critical issue before us can be determined by application of these four tests.

Coffield is in the business of grain storage and merchandise warehousing. The Houston warehousing facility is served by Southern Pacific Transportation Company, which has a railroad spur track to the facility. One wanting to store grain or goods at Coffield makes arrangements with it for storage and separate arrangements with a transportation company for shipment to the storage warehouse. Southern Pacific delivers the railcar to a site within the Coffield premises. Coffield employees are used only to move the railcars short distances incident to the unloading and storage process within the boundaries of Coffield premises. Coffield operates its rail facilities only in connection with its warehouse and storage business. It does not transport goods for public purposes. Coffield's remuneration is based upon its charges to customers for unloading, storage and loading. Coffield in no manner holds itself out to the public as performing as a part of an interstate rail transportation system. The internal transportation of goods or grains by Coffield at its facility is not performed as a part of total rail services.

[3, 4] After considering the undisputed facts we conclude that Coffield is not a common carrier by railroad. Damages for the death or injury of an employee of a railroad engaged in interstate commerce, allegedly caused by the negligence of the railroad, are recoverable exclusively from the railroad under the FELA and not under state law. *Janelle v. Seaboard Coast Line R.R. Co.*, 524 F.2d 1259 (5th Cir. 1975). The FELA in pertinent part provides that every common carrier by railroad while engaging in commerce shall be liable in damages to any person suffering injury while he is employed by that carrier in commerce. Because Coffield is not a common carrier by railroad under the FELA it is not answerable to its employee, Javier Flores, under this Act.

We affirm the trial court's judgment.

APPENDIX C

Judgment of the Court of Appeals for the Sixth Supreme Judicial District of Texas

THE STATE OF TEXAS

To the 157th District Court of Harris County—
Greeting:

BEFORE our Court of Appeals, on the 23rd day of October A.D. 1984, the cause upon appeal to revise or reverse your judgment between

Javier Flores, Appellant,

No. 9251 vs.

Coffield Warehouse Company, Appellee,

was determined; and therein our said Court of Appeals made an order in these words:

BE IT REMEMBERED that on Tuesday the 23rd day of October, A.D. 1984, the Court of Appeals for the Sixth Supreme Judicial District of Texas met in the City of Texarkana. Present William J. Cornelius, Chief Justice, Bun L. Hutchinson, Associate Justice, Charles Bleil, Associate Justice, and Louise Waldrop Lohse, Clerk, when the following proceedings, among others, were had, to-wit:

No. 9251

Javier Flores, Appellant

v.

Coffield Warehouse Company, Appellee

Appealed from the 157th Judicial District Court of Harris County, Texas

THIS CAUSE came on to be considered on the transcript of the record, the statement of facts, and upon the briefs and oral argument of the parties; and the Court, after considering the same, is of the opinion and finds there was no error in the judgment of the court below.

It is accordingly CONSIDERED, ORDERED AND ADJUDGED that the judgment of the trial court of November 28, 1983, be, and hereby is, in all things AFFIRMED, in conformity with the written opinion of this Court of even date on file herein; that appellant Javier Flores, as principal, and General Indemnity Insurance Company as surety upon appellant's appeal bond, shall pay all costs expended in behalf of this appeal, whether in this Court or in the court below, for which let execution issue; and that this judgment be certified to the court below for observance.

WHEREFORE, WE COMMAND YOU to observe the order of our said Court, in this behalf, and in all things to have it duly recognized, obeyed and executed.

WITNESS, the Hon. WILLIAM J. CORNELIUS, Chief Justice of our said Court of Appeals, with the seal thereof annexed, at the City of Texarkana, this the 10th day of April, A.D., 1985.

LOUISE WALDROP LOHSE,
Clerk

By: /s/ LILLIAN POWELL
Lillian Powell, Deputy

SEAL